IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10565 and 10263 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DIVISIONAL CONTROLLER

Versus

AMARSINH K DAMOR

Appearance:

MR KV GADHIA for Corporation.

MR JS BRAHMBHATT for workman.

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 06/04/2000

ORAL JUDGEMENT

By filing the petition being special civil application No. 10565 of 1999, the petitioner corporation [hereinafter referred to as "the Corporation] has challenged the impugned order passed by

the Industrial Tribunal, Ahmedabad in in Approval Application No. 217 of 1996 in Reference IT No. 64 of 1996 dated 128.6.1996 whereby, the tribunal has rejected the approval application. By filing the special civil application No. 10263 of 1999, the petitioner-workman [hereinafter referred to as "the workman"] has prayed for a direction to the corporation to implement the orders passed by the tribunal in the aforesaid reference by reinstating the workman in service with full back wages for intervening period. Therefore, since both the petitions are arising from the order passed by the tribunal in aforesaid Reference and since the subject matter of both the petitions is one and the same, both the petitions are heard together and are disposed of by this common judgment.

Rule in both the petitions. Learned advocate Mr. KV Gadhia appearing for the corporation in special civil application No. 10263 of 1999 has waived service of rule. Learned advocate Mr. Brahmbhatt appearing for the respondent corporation in special civil application no. 10565 of 1999 has waived service of rule on behalf of the said respondent. On the facts and in the circumstances of case and with the consent of the parties, both the petitions have been taken up for final hearing today.

The facts of the present case, in brief, are that the workman concerned namely Amarsinh K. Damor was working with the corporation as a conductor at Dahod Depot. On 9.2.94, the checking party has checked his bus and it was found that the workman has collected fare of a group of five passengers but has not issued the tickets. Regarding group of second five passengers, the workman has not collected fare and has also not issued tickets to those passengers. There were only ten passengers in the bus. The workman was, therefore, served with charhgesheet and thereafter,departmental inquiry was held against him and after affording him full opportunity to raise defence, ultimately, the workman concerned was dismissed from service on 6.9.1996. Order of termination alongwith one month wages notice pay was served. At that time, reference IT No. 64 of 1996 was pending before the industrial tribunal at Ahmedabad and, therefore, the petitioner corporation had preferred approval application no. 217 of 1996 in the said reference under section 33(2)(b) of the Industrial Disputes Act,1947. The tribunal, after considering all the relevant documents produced by the corporation and also after hearing the learned advocates appearing before him, held that the departmental inquiry initiated by the corporation against the workman concerned was against the principles of

natural justice and the same has been vitiated and complete notice pay was not given to the workman and, therefore, said approval application was rejected by the tribunal on 28th June, 1999 with costs of Rs. 500/-. Said order of the tribunal dated 28th June, 1999 has been challenged by the corporation in special civil application No. 10565 of 1999.

The workman has filed the special civil application no. 10263 of 1999 and has prayed for implementing the rejection of approval application.

During the course of hearing, both the learned advocates have made a request before this Court to examine the question of penalty of dismissal as if this Court is exercising the powers under section 11A of the Industrial Disputes Act, 1947 relying upon the decision of the apex court in the case of Workmen of Bharaht Freeze Werner (P) Ltd. reported in JT 1990 (1) SC 305 and also relying upon the recent decision of the apex court in case of Senapathy Whitley Ltd. versus Karadi Gowda and Anr. reported in 2000 LLL 364. Both the learned advocates have jointly prayed before this Court that in view of the observations made by the tribunal that the departmental inquiry has been vitiated and the findings have also been vitiated and it is a case of victimization, then, this Court may also consider the case of the workman as a court exercising the powers under Sec. 11A of the ID Act. In the case of workmen of Bharat Freeze Ltd. (supra), the apex court has held that the aforesaid directions have been given by the High Court while exercising the powers which are exercised by the labour Court or tribunal in view of the joint memo submitted by both the learned advocates for the parties whereby it was requested that the court may decide the entire matter without remitting it to the tribunal and grant appropriate relief in accordance with law. Moreover, in view of the provisions contained in section 11A of the ID Act, the tribunal is empowered to go into the question whether the punishment of discharge or dismissal passed against the workman is justified or not and as per the said provisions of sec. 11A of the ID Act, the tribunal is empowered to set aside the order of discharge or dismissal as the circumstances of the case may require. It was open to the high court to consider as to what would be the adequate punishment for the misconduct found to have been committed by this workman and to take view that the misconduct established against this workman was not such which would warrant either

dismissal or discharge and denial of half of the back wages for the period of about six years was adequate punishment for the misconduct found to have been committed by the workman. Recently, the apex court has considered the very same question and held that in such cases, the court can modify the punishment and impose the modified punishment on the workman for doing justice between the parties. It is also observed by the by the apex court that it is well settled that the powers of the labour court under sec. 11A are wide and it would be open to the high court, in justifiable cases, to modify the orders of the labour court. It has also be observed by the apex court that it is also open for this court under Article 136 of the Constitution of India to alter the punishment against the workman for doing justice between the parties.

In the present case, the workman has faced the charge of non issuance of tickets to one group of passengers from whom fare was collected by him and also a charge of non issuance of tickets to another group of five passengers from whom the fare was not recovered. The workman has completed sixteen years' service. Pursuant to the aforesaid charges, departmental inquiry was held against him and at the end of the inquiry, he was dismissed from service as stated above. According to the workman, when the bus was checked, at that time, he was busy in doing the road booking and there was no dishonest intention on his part and his past record is also good and not bad and, therefore, the question of punishment has to be considered keeping in view all these facts and circumstances of the case. Therefore, it will have to be considered by this court as to whether, on the facts and in the circumstances of the case, the punishment of dismissal from service is just, reasonable and proportionate or not and if not, what should be the appropriate punishment.

I have heard both the learned advocates for the parties. I have also considered the request made by both the learned advocates before this Court. The respondent was doing road booking and there were some minor lapses on the part of the workman. I have also considered the length of service of the workman. I have also kept in view the day to day function of the conductor. I am of the view that in view of the working schedule of the conductor, he has to work in fixed time, fixed schedule, in all seasons and, therefore, considering the nature of work, I am of the view that if such lapse takes place during the course of performance of duties , same should not be viewed so strictly. The conductor has to work in

public in a scheduled manner, in an accurate manner and therefore, before considering the case of the workman in respect of the penalty, length of service, gravity of misconduct etc. has to be kept in mind.

In this case, the misconduct for which the extreme punishment visited the worker is causing a very negligible loss to the employer. A serious question that arises in such cases would be,besides the legality of the punishment, the morality of imposing such a severe punishment as well. While imposing a punishment the employer should first consider whether the delinquent committed the offence with intent to make unlawful gain and to pilfer the revenue of the employer. Was it with the intention to gain 50 paise that the worker committed the present misconduct ? Was he in such a depraved circumstances that he desired to make an illegal gain of a trivial amount of fifty paise ? The disciplinary authority should keep in mind all facts of the problem before it awards the extreme penalty of dismissal.

A misconduct like the above on several instances is not committed insistentionally is too much to imagine that a worker would have omitted to issue tickets deliberately to gain few rupees at the risk of his job. More often, it is duty to the crowd in the bus that he misses to issue tickets than a desire by him to gain few rupees. The castastrophe that may be fall is more serious than what is sought to be prevented. First, it visits the employee. He is rendered jobless. It generates a litigation which in the present pattern spreads over years producing ultimately a disgruntled employe. Actually, the real victim of any such punishment is the family of the worker whose bread winner is jobless. The future is rendered bleak to them and it in its turn causes greater hardship to the society than it intended to cure.

That apart, the Management also shares the losses in another way. When the worker is dismissed, some one else will have to be placed in his place to discharge the duties and if the worker is ordered to be reinstated ultimately with back wages, virtually there will be double payment i.e. two persons would have to be paid for a single job. In the case of a public sector undertaking the loss is passed to the common man, the tax payer.

The question then would be in the case of a conductor who has a past history, should the employer ignore the same ?This is a case, the remedy for which the

employer himself should discover and the solution is not far to discover. In the case of a ticketless traveller the management has designed a method to curb the same by imposing fine on them. The object with which this is done is so that he may not repeat traveling in the bus without tickets. This method can certainly be considered of imposing of penalty on the conductor himself who is discovered to be intentionally pilfering the revenue of the corporation.

It should be noticed that in all such cases, there are two parties joining to commit the misconduct i.e. the conductor and the passenger. If the conductor wants to make an unlawful gain, then, he has to collect the fare and fail to issue tickets. In such an event, the passenger who boards the bus must cooperate with the conductor. If he has to cooperate,then, he should be familiar to the conductor and he should agree to be a party to commit the misconduct at the risk of paying penalty in the event of being caught by the inspecting party. It is toomuch toimagine that the conductor will hatch a conspiracy to pilfer revenue of the corporationas and when stray passengers board the bus at various stages. If the conductor wants to make an illegal gain by the omission to issue tickets, the passenger has to be condescending party. This is really unlikely. Therefore, benefit of doubt in cases of stray lapses should be that the omission to issue tickets may be accidental.

Therefore, the disciplinary authority should reserve punishment of dismissal only in extreme cases. It is where the exercise of discretion by the disciplinary authority steps in. It cannot and should not act like a robot, its justice should be moulded with humanism and understanding. It should really assess each case on its own merits. The fact that on a past occasion, the delinquent might have acted in a particular occasion as well as he would have acted with intent to cause loss to the employer. Each set of facts should be decided with reference to evidence regarding the said allegation and those allegations should be the basis of the decision May be, the past conduct of the worker may be aground to assume that the delinquent may have had propensity to commit the misconduct and to assess quantum of punishment to be imposed. But that by itself cannot provide any foundation to hold that the present conduct of the delinquent is a misconduct. Of course, in the instant case, the corporation has not produced the past record of the workman.

In view of these facts, keeping in view the hard duty and the extent of alertness required to be performed by the conductor while on duty, some time, it may happen that the same alertness or accuracy may not be preserved by the conductor. In that occasion, it has to be viewed by the disciplinary authority as a mere technical omission and/or minor lapse on the part of the conductor for which extreme penalty of dismissal cannot be imposed. Therefore, keeping in view the gravity of misconduct and nature of work required to be performed by the conductor and also the length of the workman concerned, the extreme punishment of dismissal is not justified. I am fortified in my view by the decision of this court in case of GSRTC versus M.S.Patel reported in 1998 (2) GLR 1193 and the recent decision of the Allahabad High Court in case of Ram Babu Gupta versus UP ST R Corporation Merut and others reported in 2000 LLR page 3. I am, therefore, of the opinion that the punishment of dismissal imposed upon the workman is required to be quashed and set aside and the corporation is required to reinstate the workman in service with continuity of service but without back wages for the intervening period from September, 1996 till 28th June, 1999 as a measure of punishment for the misconduct committed by the workman.

Recently, the apex court has, in case of UP State Road Transport Corporation and others versus Mahesh Kumnar Mishra and others reported in 2000 AIR SCW 931, held that the high court can interfere if the penalty shocks conscience of the Court. It has been held as under in para 8 and 9 of the judgment:

"8. This will show that not only this court but also the high court can interfere with the punishment inflicted upon the delinquent employee if, that penalty, shocks the conscience of the Court. The law, therefore, is not as contended by the learned counsel for the appellants, that the high court can, in no circumstances, interfere with the quantum of punishment imposed upon a delinquent employee after disciplinary proceedings.

9. Another Three Judge Bench of this Court in colour Chem Ltd. v. AL Alaspurkar (1998) 3 SCC 192 :1998 AIR SCW 709: AIR 1998 SC 948 : 1998 Lab IC 974), has also laid down the same proposition and held that if the punishment imposed is shockingly disproportionate to the charges held proved against the employee, it will be open to

the Court to interfere. "

Therefore, in view of the facts and circumstances of the case and also in view of the aforesaid legal position, the corporation is required to be directed to reinstate the workman in service with continuity of service but without back wages for the intervening period as aforesaid. I, therefore, pass the following order.

The corporation is directed to reinstate the workman in service with continuity of service and without back wages for the period from 6th September, 1996 to 28th June, 1999. The corporation shall reinstate the workman in service as expeditiously as possible, preferably within four weeks from the date of receipt of this order. The corporation is further directed to pay full wages to the workman from 28th June, 1999 till the date of his actual reinstatement in service within period of six weeks. Rule is made absolute subject to the aforesaid directions in both the petitions. There shall be no order as to costs.

6.4.2000. (H.K.Rathod,J.)

Vyas